Federal Court  Cour fédérale

**Date: 20110406**

**Docket: IMM-6713-09**

**Citation: 2011 FC 425**

**Ottawa, Ontario, April 6, 2011**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**FELIPE AMAGO TABUYO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION** **Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

### I. Overview

[1] After emigrating from the Philippines, Mr. Felipe Amago Tabuyo became a permanent resident of Canada in 1992. Subsequently, he committed a number of criminal offences and was found inadmissible to Canada on grounds of serious criminality. He was ordered to be deported from Canada.

[2] Mr. Tabuyo appealed to the Immigration Appeal Division (IAD) on humanitarian and compassionate grounds, but the IAD found insufficient evidence in his favour to justify overturning or staying the deportation order. Mr. Tabuyo now seeks judicial review of the IAD's decision, arguing that the panel applied the wrong legal test, rendered an unreasonable decision and failed to issue adequate reasons for its conclusion. In addition, Mr. Tabuyo argues that the absence of a transcript of the hearing before the IAD prevents meaningful judicial review of the IAD's decision. He asks me to overturn that decision and order a new hearing.

[3] I can find no basis for overturning the IAD's decision and must, therefore, dismiss this application for judicial review. In my view, the IAD applied the correct legal test, reached a conclusion that was supported by the evidence and explained its reasoning adequately. Further, I find that the absence of a transcript, in the circumstances of this case, did not interfere with Mr. Tabuyo's application for judicial review.

[4] As mentioned, there are four issues:

1. Did the IAD apply the wrong legal test?
2. Did the IAD render an unreasonable decision?
3. Were the IAD's reasons inadequate?
4. Did the absence of a transcript prevent meaningful judicial review?

## II. The IAD's Decision

[5] The IAD was concerned solely with the question of humanitarian and compassionate grounds, not the legality of the deportation order itself. After setting out Mr. Tabuyo's criminal record, the panel noted the factors to be considered, as set out in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IADD No 4 (QL):

- the seriousness of the offence;
- the possibility of rehabilitation;
- the likelihood of re-offending;
- the length of time spent in Canada and the degree of establishment here;
- the degree of community support available to him, and the impact of deportation on his family; and
- the hardship that return to his country of nationality would cause him.

[6] The IAD then set out the burden of proof on Mr. Tabuyo, namely, the obligation to establish exceptional reasons why he should be allowed to remain in Canada (relying on *Camara v Canada (Minister of Citizenship and Immigration)*, 2006 FC 169). From there, after noting that Mr. Tabuyo's testimony was not credible, the IAD considered the evidence before it in relation to the applicable factors. Among its findings were these:

- the offences with which Mr. Tabuyo was charged were serious and included uttering a forged document, which is punishable by up to ten years' imprisonment;

- Mr. Tabuyo's criminal record included numerous crimes against business owners, a credit card company and a former employer which, while not violent, were nonetheless serious in their nature and gravity;
- the judge who sentenced Mr. Tabuyo in 2008 to five months' imprisonment for uttering a forged document found that there were aggravating factors to consider: Mr. Tabuyo had not availed himself of opportunities to deal with his gambling addiction, had breached a conditional sentence, and had committed a breach of trust;
- Mr. Tabuyo had failed to follow up with treatment for his gambling addiction when he was offered it and, although he had attended some counselling sessions for his drug addiction, he had not made a meaningful attempt to address these problems;
- Mr. Tabuyo remains a risk to re-offend;
- Mr. Tabuyo lacked remorse and had not made efforts to provide restitution for the victims of his crimes;
- Mr. Tabuyo's connection to Canada is solely through his family who, while providing him some financial and emotional support, would not be seriously affected by his deportation;
- while he has worked continuously as a hairdresser, Mr. Tabuyo has not made any investments, acquired any property, become involved in the community, pursued post-secondary education, or established lasting friendships in Canada; and
- removal from Canada would be inconvenient for Mr. Tabuyo but would not cause him hardship given that he spent most of his adult life in the Philippines, speaks the language, and could find a job there.

[7] The IAD also noted the objectives of the *Immigration and Refugee Protection Act* [IRPA], SC 2001, c 27, which include the promotion of security by "denying access to Canadian territory to persons who are criminals or security risks" (IRPA, s. 3(*i*) (see Annex); *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51).

[8] Taking all of this into account, the IAD concluded that Mr. Tabuyo had some humanitarian and compassionate factors in his favour; however, the other factors far outweighed them. The IAD stated that "[t]he safety and order of the Canadian public far outweigh any dislocation caused to [Mr. Tabuyo] or his family, by [his] removal from Canada." Accordingly, it dismissed the appeal and denied a stay of removal.

(1) Did the IAD apply the wrong legal test?

[9] Mr. Tabuyo argues that the IAD erred in law by failing to apply the test set out in *Jugpall v Canada (Minister of Citizenship and Immigration)*, [1999] IADD No 600 (QL), another decision of the IAD. In *Jugpall*, the IAD had concluded that the proper approach is to measure the compassionate and humanitarian factors in the appellant's favour against the particular legal obstacle to admissibility that the person faces. Where the legal obstacle is high, the appellant will have to show compelling reasons to justify overturning a deportation order. On the other hand, where the obstacle is relatively minor, less compelling circumstances will allow the person to remain in Canada.

[10] In my view, there is nothing special about the test in *Jugpall* which would make it mandatory to apply. Here, the IAD considered numerous factors including the particulars of the grounds for inadmissibility (serious crimes) and the humanitarian and compassionate factors in Mr. Tabuyo's favour (family and work history). This approach, which the Supreme Court of Canada has characterized as the correct one (*Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12), involves the weighing and balancing of all the relevant evidence before the IAD. In practice, so long as the relevant evidence is duly considered, there is likely to be little difference in the outcome whether the IAD uses the *Ribic* approach or the *Jugpall* analysis. The latter approach may, in fact, be best suited to cases of financial inadmissibility (as in *Jugpall* itself) or medical inadmissibility (as in *Chauhan v Canada (Minister of Citizenship and Immigration)*, [1997] IADD No 2052 (QL)) when the legal obstacles are sometimes relatively minor and the other factors to be considered will be made up largely of positive grounds for relief put forward by the appellant. It may be less suitable for cases involving inadmissibility for serious criminality where there is likely to be a complex array of circumstances to be considered. In those cases, like this one, there will usually be multifarious factors to be analyzed and weighed. A binary analysis, such as that proposed in *Jugpall*, will be less appropriate.

[11] In any case, I can find no legal error in the approach adopted by the IAD.

(2) Did the IAD render an unreasonable decision?

[12] Mr. Tabuyo argues that the IAD's decision is unreasonable given that it failed to take account of the particular circumstances surrounding his crimes. Without that analysis, the IAD's characterization of those offences as "serious" is flawed, he says. In addition, Mr. Tabuyo maintains that the IAD placed too much emphasis on his gambling and drug addictions; he notes that gambling is legal and he was never convicted of any drug offences.

[13] In my view, the IAD sufficiently considered the nature of the offences. It made specific reference to the convictions against Mr. Tabuyo, who his victims were, the absence of violence, and the specific factors that were taken into account by the sentencing judge. I also note that Mr. Tabuyo has not pointed to any particular aspects of his offences that the IAD overlooked that might have advanced his request for humanitarian and compassionate relief.

[14] I also find that the IAD did not give undue attention to Mr. Tabuyo's difficulties with gambling and drugs. These were relevant to the question of Mr. Tabuyo's rehabilitation and likelihood of re-offending, both of which were factors the IAD had a duty to evaluate. I see no error in the IAD's treatment of the evidence in these areas.

[15] Accordingly, in my view, the IAD's conclusion was reasonable in the sense that it was a defensible outcome based on the facts and the law.

(3) Were the IAD's reasons inadequate?

[16] Mr. Tabuyo argues that the IAD's reasons were deficient because they failed to set out the proper analysis and address all of the relevant circumstances.

[17] To my mind, this argument is virtually co-extensive with the submission that the IAD's conclusion was unreasonable. Both depend on a finding that the IAD left out important facts or factors that were relevant to his claim for humanitarian and compassionate relief. Having reviewed the IAD's decision and found that its approach was appropriate and its conclusion reasonable, it follows that its reasons were adequate.

(4) Did the absence of a transcript prevent meaningful judicial review?

[18] Somehow, due to a technical problem, no transcript of the hearing before the IAD is available. Mr. Tabuyo argues that the absence of a transcript impedes his ability to have his case judicially reviewed.

[19] Certainly, in some cases, the absence of a transcript can prevent meaningful judicial review. As I stated in *Agbon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 356, "where the applicant raises an issue that can only be determined on the basis of a record of what was said at the hearing, the absence of a transcript prevents the Court from addressing the issue properly" (para 3).

[20] Here, however, the lack of a transcript has had little effect on Mr. Tabuyo's application for judicial review. His application is not based on any allegation that the IAD erred in its fact finding or credibility determinations. Nor is he alleging any breach of fairness at the hearing.

[21] Mr. Tabuyo's sole submission is that a transcript is required in order to meet the Minister's argument, set out in a further memorandum, that the Board "took into account the contents of the record before it". However, the Minister's submission merely noted that the IAD had specifically stated that it took into account the whole of the record, in addition to the testimony before it, when deciding whether Mr. Tabuyo's appeal should be allowed. It was clearly not referring to the transcript in that passage. Further, Mr. Tabuyo has not pointed to any particular prejudice he has suffered in presenting his application for judicial review by virtue of not having access to a transcript of the hearing.

[22] In the circumstances, the absence of a transcript has not prevented Mr. Tabuyo from raising all of the arguments he wished to present on his application.

III. Conclusion and Disposition

[23] In my view, the IAD applied the proper test and rendered a reasonable decision, for which it provided adequate reasons. The absence of a transcript of the hearing before the IAD had no discernible effect on Mr. Tabuyo's application for judicial review. Accordingly, I must dismiss this application for judicial review.

[24] Mr. Tabuyo proposed a question of general importance in respect of Issue (1), above:

> Is the Immigration Appeal Division of the Immigration and Refugee Board, in exercising its discretionary jurisdiction under the *Immigration and Refugee*

> *Protection Act* sections 67 and 68(1), required to weigh or balance the degree of compelling humanitarian and compassionate circumstances on which the individual relies against the nature and extent of the legal obstacle to admissibility and other circumstances adverse to the appellant?

[25] The Minister opposes the certification of the question given that the test employed by the IAD here has been endorsed by the Supreme Court of Canada. I agree that the proposed question does not raise a serious matter of general importance in light of the applicable Supreme Court of Canada case law (*Chieu* and *Khosa*, above), and will, therefore, not certify the question.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is dismissed.

2. No question will be certified.

"James W. O'Reilly"

Judge

Annex

| *Immigration and Refugee Protection Act*, SC 2001, c 27 | *Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27 |
|---|---|
| Objectives — immigration | Objet en matière d'immigration |
| 3. (1) The objectives of this Act with respect to immigration are: | 3. (1) En matière d'immigration, la présente loi a pour objet : |
| … | […] |
| (*i*) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; | *i*) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité; |

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6713-09 |
| **STYLE OF CAUSE:** | FELIPE AMAGO TABUYO v THE ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | Winnipeg, Manitoba |
| **DATE OF HEARING:** | February 8, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | O'REILLY J. |
| **DATED:** | April 6, 2011 |

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